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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF INDIANA,
SOUTH BEND DIVISION

CIVIL No. 9

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHRYSLER CORPORATION, ET AL.,
Defendants.

STATEMENT AS TO JURISDICTION.

In compliance with Rule 12 of the Supreme Court of the United States, as amended, Chrysler Corporation, DeSoto Motor Corporation, Plymouth Motor Corporation, Dodge Brothers Corporation and Chrysler Sales Corporation (hereinafter referred to as the appellants or the "Manufacturer") submit herewith their statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this case.

The basic question involves the authority of the trial court to modify an anti-trust consent decree over the objection of the defendants.

A. *Jurisdiction statute.*—The statutory provisions that confer jurisdiction upon this Court to review the decree of the District Court upon direct appeal are Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as

amended, 15 U. S. C. Sec. 29 and Section 238 of the Judicial Code, as amended, 28 U. S. C. Sec. 345. The direct appeal provided by these statutes is the sole mode of review available to appellants. The following cases sustain the jurisdiction of the Supreme Court:

Swift & Co. v. *United States,* 276 U. S. 311, 323;
United States v. *California Co-op. Canneries,* 279 U. S. 553, 558;
United States v. *Swift & Co.,* 286 U. S. 106, 109;
Ethyl Gasoline Corp. v. *United States,* 309 U. S. 436.

B. *Dates of decree and petition for appeal.*—The date of the final decree of the District Court here sought to be reviewed is December 21, 1940. It reads as follows (R. 54):

FINAL DECREE—IN MODIFICATION.

This matter came on to be heard by the Court on a motion of the United States for modification of the final decree, and the Court having heard argument of counsel and having considered the matter, and it having appeared to the Court that the allowance of such motion is just and equitable,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the aforesaid final decree shall be and is hereby modified so that the second paragraph of Section 12 thereof shall read as follows:

It is an express condition of this decree that notwithstanding the provisions of the preceding paragraph of this paragraph 12 and of any other provisions of this decree, if an effective final order or decree not subject to further review shall not have been entered on or before January 1, 1942, requiring General Motors Corporation permanently to divest itself of all ownership and control of General Motors Acceptance Corporation and of all interest therein, then and in that event, nothing in this decree shall preclude the Manufacturer from acquiring and retaining ownership of and/or control over

or interest in any finance company, or from dealing with such finance company and with the dealers in the manner provided in this decree or in any order of modification or suspension thereof entered pursuant to paragraph 12a. The Court, upon application of the respondents or any of them, will enter an order or decree to that effect at the foot of this decree, and the right of any respondent herein to make the application and to obtain such order or decree is expressly conceded and granted.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that except as thus modified the decree as previously entered shall stand in full force and effect.

The date upon which application for appeal to this Court was presented to District Judge Thomas W. Slick was February 14, 1941, and Judge Slick allowed the application on February 14, 1941 (R. 56, 75-76).

C. *Statement.*—This is an appeal from a final decree of the District Court of the United States for the Northern District of Indiana, South Bend Division (R. 54-55), modifying an earlier final decree by the same court which had been entered with the consent of the parties in a suit in equity brought by the United States under Section 4 of the Sherman Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209, as amended, 15 U. S. C. Sec. 4 (R. 37). The consent decree that the District Court thus attempted to modify restrained appellants, among other things, from acquiring any interest in any finance company, subject, however, to the condition that, if an effective final order should not have been entered before January 1, 1941, similarly requiring General Motors Corporation to divest itself of ownership of General Motors Acceptance Corporation, then nothing in the consent decree should preclude the Manufacturer from acquiring an interest in a finance company (See pp. 19-20 of the decree appearing at R. 37). The District Court by

the new decree attempted to extend the period of conditional restraint from January 1, 1941, to January 1, 1942, by changing the date in one paragraph of the original decree. Since the District Court did this without testimony, findings, conclusions, or an opinion, it is necessary to make a somewhat extended statement of the facts and questions presented.

Original proceedings.—On November 7, 1938, in the United States Court for the Northern District of Indiana, South Bend Division, the United States filed its complaint in equity against the Manufacturer, appellant herein, and against the Commercial Credit Company and certain wholly-owned subsidiaries of the Commercial Credit Company (R. 2-20). The bill, under Section 1 of the Sherman Act, alleged that Chrysler Corporation, together with these finance companies, had conspired to exclude all other finance companies from financing the sale of automobiles. The bill prayed, among other things, that Chrysler Corporation be restrained "from acquiring in any way an interest in any finance company or by gift, loan or otherwise rendering financial assistance to any finance company" (R. 18).

On the same day that the bill and answer (R. 22) filed there was submitted to the court a proposed consent decree, which was entered as the final decree of the court on November 15, 1938 (R. 37). Among other restraints and requirements imposed upon the defendant motor companies, the decree provided in Section 12:

> The Manufacturer shall not make any loan to or purchase the securities of Respondent Finance Company (that is, the Commercial Credit Company and its subsidiaries) or any other finance company • • •

However, it was also provided, in the next paragraph of the same section that:

It is an express condition of this decree that notwithstanding the provisions of the preceding paragraph of this paragraph 12 and of any other provisions of this decree, if an effective final order or decree not subject to further review shall not have been entered on or before January 1, 1941, requiring General Motors Corporation permanently to divest itself of all ownership and control of General Motors Acceptance Corporation and of all interest therein, then and in that event, nothing in this decree shall preclude the Manufacturer from acquiring and retaining ownership of and/or control over or interest in any finance company, or from dealing with such finance company and with the dealers in the manner provided in this decree or in any order of modification or suspension thereof entered pursuant to paragraph 12a.

Proceedings against General Motors.—The United States had originally obtain three indictments—one against appellants herein and the finance companies with which it had been dealing, one against the Ford Motor Company and certain finance companies with which it had been dealing, and one against General Motors Corporation and its wholly owned finance company. Appellants herein consented to the equity decree quoted last above and the Ford Motor Company also consented to a similar decree, but General Motors declined. Accordingly, the Government quashed the indictments against Chrysler and Ford and Section 12 of the Chrysler consent decree and the corresponding section of the Ford decree were designed to protect them against prolonged disadvantage in competition with the non-consenting General Motors Corporation.

Subsequently in the criminal proceeding against General Motors on the indictment mentioned above the jury returned verdicts of guilty against General Motors Corporation and General Motors Acceptance Corporation; the court imposed sentence on November 17, 1939; and an appeal from

that judgment is now pending in the United States Circuit Court of Appeals for the Seventh Circuit.

Notwithstanding the express condition of the decree against appellants, the United States waited more than twenty months before it filed its bill in equity against General Motors Corporation and General Motors Acceptance Corporation to compel General Motors to divest itself of the Acceptance Corporation. Not until October 4, 1940, less than three months before the expiration of the period within which the United States had agreed to secure a decree against General Motors or release appellants from the restraint of Section 12, did the United States file its bill in equity in the District Court of the United States for the Northern District of Illinois, Eastern Division, seeking the result upon which continued restrain of appellants under Section 12 was predicated.

Present pleadings.—On December 17, 1940, the United States filed its "motion" for modification of the consent decree praying that in the second paragraph of Section 12 of the decree (as quoted above), the date "January 1, 1942" be substituted for "January 1, 1941" (R. 41-45). Attached thereto was an affidavit by a representative of the Department of Justice as to the truth of the statements in the motion (R. 46). In brief, the motion specifically asked for the extension of the restraint for one year, despite the decree provision to the contrary.

The answer of appellants denied the allegations of the motion of the United States and prayed (R. 48, 51):

> (1) That said motion be dismissed forthwith; or
>
> (2) That, if said motion be not dismissed, plaintiff be required to plead or elect with particularity (a) whether it relies upon mistake, surprise, inadvertence, or excusable neglect (if so, setting forth with certainty the facts upon which such claim is made) or (b) whether

it relies upon changed basic conditions of fact or law (if so, setting forth with particularity such changed conditions); and that defendants, thereafter, be given sufficient notice and opportunity to prepare its response and defense; or

(3) That, if said motion be not dismissed and if plaintiff is not required to plead further, the motion now filed herein be set down for hearing for the taking of proof on the merits, upon such terms and conditions as will assure defendants due notice of the issues and adequate opportunity to prepare its response or defense thereto.

Attached to this answer was the affidavit of counsel for the Manufacturer stating that he was present at substantially all of the conferences and negotiations at which the parties agreed upon the contents of the final decree and that the answer is true of his own knowledge (R. 52).

Action of the trial court.—Despite the fact that the Government had the burden of proof and that there was no waiver of proof by appellants, no evidence was submitted by the Government (R. 53). After hearing argument and without ruling on the prayers of appellants' answer, the court on the same day, December 21, 1940, made its "Final Decree—in Modification" directing the changing of the date in the second paragraph of Section 12 of the decree to "January 1, 1942" as requested by the Government (R. 54-55). The court made no findings of fact and stated no conclusions of law. There was no opinion.

It thus appears that more than two years after entry of a final consent decree and contrary to the express provision of that decree as quoted above, to which it had consented, the United States has sought by mere motion to modify the decree in a substantial particular so as to extend for at least another year a substantial restraint upon the Manufacturer and subject it to a serious competitive disadvan-

tage, despite the fact that, on the face of the consent decree, it is clear that the extent of this disadvantage had been carefully measured and expressly limited in determining the agreed period of the restraint. The court, apparently without a qualm as to the question of its power in the circumstances or the extent of that power if it existed, summarily granted the request to modify and extend the consent decree despite the protest of the parties subject to the decree and without evidence or findings.

D. *Substantial nature of the questions presented.*—The failure of the court to make findings of fact or state its conclusions of law leaves entirely to speculation the theory and grounds upon which it proceeded. Particularly in an anti-trust case which comes to this Court by direct appeal, such findings and conclusions of law have been held to be essential to intelligent and orderly presentation and proper disposition of such an appeal. Federal Rules Civ. Proc. 52; *Interstate Circuit* v. *United States,* 304 U. S. 55, 56-57; *Railroad Commission* v. *Maxcy,* 281 U. S. 82, 83.

The so-called "motion" of the United States seems to seek the modified decree on the ground of mutual mistake of the parties. However, because the relief sought is that commonly sought by a supplemental bill, *Independent Coal & Coke Co.* v. *United States,* 274 U. S. 640, 647; *United States* v. *International Harvester Co.,* 274 U. S. 693, 703, the motion must be treated as in the nature of a supplemental bill or as an ancillary bill in the nature of a bill of review recognized in Rule 60(b)(1). Cf. *Perkins* v. *Hendryx,* 149 Fed. 526; *Central Hanaver Bank & Trust Co.* v. *Wardman Real. E. P.,* 31 F. Supp. 685, 687. Indeed, it seeks, as to the appellants herein, relief identical with that sought in the original bill which prayed that Chrysler Corporation be restrained "from acquiring in any way an interest in any finance company." Since the present motion of the

United States seeks an extended result which the parties subject to the original decree oppose, it is in the nature of an original bill so far as that result is concerned. It admitted of an answer and required proof to be taken and the facts ascertained. *Buffington* v. *Harvey,* 95 U. S. 99, 107; *Pacific Railroad Co.* v. *Ketchum,* 101 U. S. 289, 295; *Kaw Valley Drainage District* v. *Union Pac. R. Co.,* 163 Fed. 836, 837.

For this reason, the application of the United States may not be regarded as a motion under Rule 60(b) of the Federal Rules of Civil Procedure providing:

> On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken.

Even were this Rule otherwise applicable, the pleading of the Government, not having been made within six months after the final decree was entered, may not be regarded as a motion under the Rule. *Sprague* v. *Ticonic National Bank,* 307 U. S. 161, 169, note 9; *Maryland Casualty Company* v. *Cox,* 104 F. (2d) 354, 357. Moreover, since the pleading filed by the Government, though labelled as such, was not properly a "motion", Rule 43(e) which provides for the disposition of motions upon mere affidavits is not applicable. Yet, the Government made no attempt to introduce evidence and the trial court required none.

Assuming for the moment that the trial court had jurisdiction or authority to reopen the consent decree in the circumstances here presented, in so far as the motion may have proceeded on the ground of change in conditions and since it was opposed and not consented to, a "definite factual showing of illegality" was required for the entry of

the new or modified decree. *Board of Trade* v. *United States,* 246 U. S. 231, 238; *Standard Oil Co.* v. *United States,* 283 U. S. 163, 179; *Appalachian Coals* v. *United States,* 288 U. S. 344, 377. Otherwise there is no warrant for the modifying order. And since the allegations of mutual mistake also are squarely denied, the United States had the burden of proof on that issue as well. The existence of the facts were issues in the case and it was necessary for the United States to establish them by substantial evidence in order to sustain its right to the relief sought.

But the court either proceeded without evidence or treated the affidavit of the Government as the evidence in the case. An affidavit, being purely *ex parte,* cannot be considered on the final hearing. *Cucullu* v. *Hernandez,* 103 U. S. 105. In either event, therefore, the court violated fundamental right and the rule entitling the parties to a trial of issues of fact, not upon hearsay, but upon the testimony of persons having first hand knowledge of the facts who are produced as witnesses and are subject to the test of cross-examination. *United States* v. *International Harvester Co.,* 274 U. S. 693, 703; *Hop Bitters Manuf'g Co.* v. *Warner,* 28 Fed. 577; *Hyman* v. *Pottberg's, Ex'rs.,* 101 F. (2d) 262; *Parrott Speed Fastener Corp.* v. *E. W. Carpenter Mfg. Co.,* 26 F. Supp. 622, 623; Cf. *Lare* v. *Harper & Bros.,* 36 Fed. 481, 483; *Vonherberg* v. *City of Seattle,* 20 F. (2d) 247, 248. Moreover, the affidavit of the Government, even if admissible, was clearly insubstantial, was sharply controverted, and failed to state facts upon which the modification and extension of the decree could be based.

Finally there is presented the question whether, as a matter of law, the trial court had authority in any event to modify, without the consent of the parties, a decree entered and based upon the consent of the parties—particularly when such modification relates to a provision of the original decree which appears upon its face to have been

the subject of special consideration and agreement by the Government as well as by the defendants. *United States* v. *International Harvester Co.*, 274 U. S. 693, 703.

E. *Conclusion.*—It is thus plain that this appeal is within the exclusive jurisdiction of this Court and involves the review of substantial errors of the court below.

Respectfully submitted,

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